

In The United States District Court

Middle District of Pennsylvania

2 to cl

Richard Wojtyza

Plaintiff,

Vs.

Penna. Dept. of Corrections, et al

Defendants

ORIGINAL

Civil Action

No. 1:01-1163

(Rambo, J.)

(Mannion, M.J.)

(9 (7)

7/19/01

Kom

Plaintiff's Objections to the

Magistrate Judge

Report - Recommendations -

Findings

Denying Appointment of Counsel

Memorandum of Law

FILED
HARRISBURG

JUL 19 2001

MARY E. D'ANDREA, CL

Per. 98

DEPUTY CLERK

Respectfully submitted,

Dated: 7-17-01

s/ Richard Wojtyza

Richard Wojtyza KAF5977

1100 Pike St.

Huntingdon, Pa. 16654-1112

Table of Citations

Abdullah V. Hunter, 949 F2d 1032, 1036 (8 Cir 1991) cert den. 112 Sct 1995 (1992)
Bounds V. Smith, 97 Sct 1491 (1977)
Catlin V. U.S., 65 Sct 631 (1945)
De Bardeleben V. Quinlin, 937 F2d 502, 504-06 (10 Cir. 1991)
Denton V. Hernandez, 112 Sct 1728, 1734 (1992)
Flowers V. Turbine Support, Dkt 507 F2d 1242, 1244 (5 Cir. 1975)
Foley V. City of Lowell Mass., 948 F2d 10, 14 (1 Cir. 1991)
Gatson V. Coughlin, 679 F Supp. at 273.
Hodge V. Police Officers, 802 F2d 58, 61 (2 Cir. 1986)
Jackson V. County of McLean, 953 F2d 1070, 1073 (7 Cir. 1992)
Jarvis V. McMcMickens, 660 F Supp 325, 326 (SDNY 1987)
Knighton V. Watkins, 616 F2d 795, 799 (5 Cir. 1980)
Knapp V. Johnson, 977 F2d at 1006-07.
Larimer V. U.S., 861 F2d 1267, 1269-70 (Fed. Cir. 1988) citing cases.
Lawo Lines SRL V. Clauser, 109 Sct 1976 (1989)
MacIn V. Freake, 650 F2d 885, 888 (7 Cir. 1981)
McCarthy V. Weinberg, 753 F2d 836, 839-40 (10 Cir. 1985)
Mc Truckin V. Smith, 974 F2d 1050, 1057-58 (9 Cir. 1992)
Moore V. Mabun, 972 F2d 269, 272 (5 Cir. 1992)
Nelson V. Coughlin, 679 F Supp 1186, 1189 (SDNY 1987)
Rayes V. Johnson, 969 F2d 700, 703-04 (8 Cir.) cert den. 113 Sct 658 (1992)
Robbins V. Maggio, 750 F2d 405 (5 Cir. 1985)
Sands V. Lewis, 886 F2d 1166, 1171 (9 Cir. 1988)
Swofford V. Mandrell, 969 F2d 547, 552 (7 Cir. 1992)
Tabron V. Grace, 6 F3d 147, 156 (3 Cir. 1993)
Toussaint V. McCarthy, 801 F2d 1080, 1108-10 (9 Cir 1986) cert den 481 U.S. 1069 (1987)
Tucker V. Dickey, 631 F Supp 1124, 1133-34 (W.D. Wa. 1985)
Tucker V. Randall, 948 F2d at 392.
U.S. V. Taylor, 108 Sct 2413 (1988)
Whisenant V. Yram, 739 F2d at 163.

The United States District Court, Middle District of Penna. has denied plaintiff's request for appointment of Competent Legal Counsel (Court's denial, attached; Plaintiff's request for appointment of Competent legal counsel, attached).

For the facts and citations of law contained herein, your plaintiff, Richard Hofstark, respectfully files this Appeal of the Court's denial of his Motion for appointment of Legal Counsel. In this particular case, this denial is appealable -- Laracey v. U.S., 861 F2d 1267, 1269-70 (Fed. Cir. 1988) citing cases.

Your plaintiff is not knowledgeable nor trained in the law, he cannot afford to pay for the services of an experienced, competent attorney to represent him in this Civil Action.

Because of plaintiff's disabilities he does not have access to the law library AND there are no certified pro se legal at S.C.I. Huntingdon, Pa. to assist him.

This denial by the court, to appoint experienced legal counsel for plaintiff, effectively terminates this litigation because plaintiff cannot represent himself. This affects the outcome of the case -- Catlin v. [redacted], 507 F2d 1242, 1244 (5th Cir. 1975); F. Lowery v. Turbine Supply, Inc., 507 F2d 1242, 1244 (5th Cir. 1975). This denial by the court has denied this plaintiff a fair opportunity to be heard -- Mc Guirk v. Smith, 974 F2d 1050, 1057-58 (9th Cir. 1992); De Bardeleben v. Quinlin, 937 F2d 502, 504-06 (10th Cir. 1991).

The denial conclusively determines a disputed question and resolves an important issue completely separate from the merits of this action, therefore is immediately appealable -- Lauro Lines S.R.L. v. Classen, 109 S.Ct. 1976 (1989); Denton v. Hernandez, 112 S.Ct. 1728, 1734 (1992).

The court erroneously determined that the restricting value of Not appointing counsel for the plaintiff for outweighs the Prejudice to plaintiff proceeding without legal counsel.

The court abused its discretion -- Foley v. City of Lowell Mass., 948 F2d 10, 14 (1st Cir. 1991);

U.S.V. Taylor, 1083ct 2413 (1988);
Denton V. Hernandez, supra.

No showing of prejudice is required by the plaintiff when he claims, as he does in this case, a substantial denial or interference with access to an adequate 'law library' or to 'legal assistance' --- the 'core requirements' of court access --- Sands V. Lewis, 886 F2d 1166, 1171 (9th Cir. 1988).

Your plaintiff suffers from a chronic, incurable, extremely painful degenerating bone disease in his knee, hips, disc in spine. This condition has deteriorated to the point where plaintiff cannot move about the prison. Plaintiff cannot stand for any length of time, nor walk up or down steps --- Tabron V. Hise, 6 F3d 147, 156 (3rd Cir. 1993); Rayes V. Johnson, 969 F2d 700, 703-04 (8th Cir. cert. den. 1133ct 658 (1992)).

Because of plaintiff's disabilities, he does not have physical access to the 'prison law library' (the 'law library' at S.C. Huntington, Pa. is on the second floor) --- Toussaint V. McCarthy, 801 F2d 1080, 1108-10 (9th Cir. 1986) cert. den. 481 U.S. 1069 (1987). there are no certified para legale, trained in the law at S.C. to assist the plaintiff --- Bounded V. Smith, 973ct 1491 (1977).

Your plaintiff is not knowledgeable or trained in the law. A 'call delivery system'/'paging system' would be unproductive since plaintiff would not know what to ask for --- Knop V. Johnson, 977 F2d at 1006-07.

With the appointment of competent, experienced legal counsel in this case, counsel could explain the applicable legal principles in the complaint AND limit the litigation to potentially meritorious issues. In addition, competent counsel provides the unlettered inmate with an opportunity to representation at least as equally qualified with the professional counsel provided for the defendants --- Knighton V. Watkins, 616 F2d 795, 799 (5th Cir. 1980).

Legal counsel for the plaintiff can do a better job than the plaintiff in performing the difficult tasks of litigation, by virtue of experience and of Not being locked up in the defendants' custody.

- (a) A reading of plaintiff's complaint shows his case does have merit. The disabilities of the plaintiff are contained in his medical files at S.C.I., Huntingdon, Pa.. Plaintiff's Civil Action presents to the court, Constitutional 'issues of substance' - competent legal counsel should be appointed - Tabron v. Grace, supra.; Javeri v. McMcMickens, 660 F.Supp. 325, 326 (S.D.N.Y. 1987).
- (b) Because of the conditions of the plaintiff's confinement severely disadvantages him in this litigation and also in discovery, competent legal counsel should be appointed. - Tucker v. Dickey, 613 F.Supp. 1124, 1133-34 (W.D. Wisc. 1985).
- (c) The facts, in this case, will undoubtedly be strongly contested by the defendants, and there is No doubt there will be conflict with the statements of the defendants emanating into a Credibility contest between the plaintiff and the defendants, competent, experienced legal counsel should be appointed to plaintiff. - Tabron v. Grace, supra at 156; MacLin v. Freake, 650 F2d 885, 888 (7 Cir. 1981); Gatson v. Coughlin, 679 F.Supp. at 273.
- (d) Because of his disabilities, as previously stated - Not being knowledgeable in the law - No access to 'law library' - No certified paralegal trained in the law to assist him.
 - the court's denial of appointment of legal counsel for plaintiff, effectively STOPS plaintiff in his litigation of this Civil action - and his access to the courts -
Tabron v. Grace, supra at 156; Rayes v. Johnson, supra at 703-04; McCarthy v. Weinberg, 753 F2d 836, 839-40 (10 Cir. 1985); Whisenant v. Yuam, 739 F2d at 163.
- (e) The complex factual and legal issues contained in plaintiff's complaint, require the use of expert witnesses to explain medical issues, also the fact that this case will be tried before a jury requires the appointment of competent, experienced legal counsel.

for plaintiff -- Tabron V. Grace, supra at 156; Jackson V. County of McLean, 953 F2d 1079, 1073 (7 Cir. 1992); Robbins V. Maggio, 750 F2d 405 (5 Cir. 1985); Hodge V. Police Officers, 802 F2d 58, 61 (2 Cir. 1986); Moore V. Mabius, 976 F2d 268, 272 (5 Cir. 1992); Tucker V. Randall, 948 F2d at 392; Abdullah V. Hunter, 949 F2d 1032, 1036 (8 Cir. 1991) cert den. 112 S Ct 1995 (1992).

See also -- Nilsson V. Coughlin, 670 F. Supp. 1186, 1189 (SDNY 1987) application of 8th amendment; Swygard V. Mandrell, 969 F2d 547, 552 (7 Cir. 1992) state of mind - deliberate indifference -- these complex issues are contained in plaintiff's Civil Action, this corroborates the appointment of competent, experienced legal counsel for the plaintiff.

For the facts and citations of law contained herein, it is imperative for this Honorable Court to appoint competent, experienced legal counsel for the plaintiff.

Dated: 7-17-01

Respectfully submitted,

s/ Richard Wojtylak
Richard Wojtylak AF5977
1100 Pike St.

Huntingdon, Pa. 16654-1112
c/c

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD WOJTCZAK,	)	CIVIL ACTION
Plaintiff,)	
v.	)	No. _____
)	
PA. DEPT. OF CORRECTIONS, ET AL.,	)	JURY TRIAL DEMANDED
Defendants.)	

ORDER

AND NOW, this day of , 2001, upon consideration of
Plaintiff's motion for appointment of counsel, it is hereby GRANTED.

By the Court:

J.

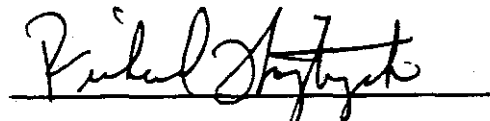
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD WOJTCZAK,	)	CIVIL ACTION
Plaintiff,)	
v.	)	No. _____
)	
PA. DEPT. OF CORRECTIONS, ET AL.,	)	JURY TRIAL DEMANDED
Defendants.)	

MOTION FOR APPOINTMENT OF COUNSEL

Now comes Richard Wojtczak, Plaintiff, pursuant to Middle District Rule 7.1 and 28 U.S.C. §1915(e)(1), and requests this Honorable Court to appoint counsel in the above captioned matter. The reasons for the appointment of counsel are outlined in the accompanying memorandum of law.

Respectfully submitted,



Richard Wojtczak, pro se
AF-5977
1100 Pike Street
Huntingdon, PA 16654-1112

Dated 6-11-01

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD WOJTCZAK,	)	CIVIL ACTION
Plaintiff,)	
v.	)	No. _____
)	
PA. DEPT. OF CORRECTIONS, ET AL.,	)	JURY TRIAL DEMANDED
Defendants,)	

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR APPOINTMENT OF COUNSEL**

STATEMENT OF THE CASE

This is a civil rights case filed under 42 U.S.C. §1983 by a state prisoner asserting claims against state officials in violation of the Americans with Disabilities Act (ADA) of 1990 - the Rehabilitation Act of 1973, Titles I, II, 42 U.S.C. §12101 et seq. and the Eighth and Fourteenth Amendments of the United States Constitution.

STATEMENT OF FACTS

The Plaintiff suffers from a chronic, degenerating bone disease in both knees, hips, and disc in spine, and had reached a point where he could no longer walk to the dining hall to eat. Plaintiff is also a diabetic requiring three injections of insulin per day along with three meals to achieve the correct insulin-food balance required to keep his diabetes under control. However, the

defendants in this case deliberately refused to feed the Plaintiff in his cell, knowing full well the adverse effects this would have on his health. The defendants also terminated the Plaintiff's medical showers, without any provisions whatsoever as required by the ADA, causing him to acquire a painful and serious cyst condition on his face, scalp and other areas of his body.

ARGUMENT

The Court should appoint counsel for the Plaintiff for the following reasons:

1. INDIGENT INMATE

Plaintiff is an indigent inmate incarcerated at the State Correctional Institution, Huntingdon (SCIH), Pa. and unable to afford counsel for this civil action.

2. LAW LIBRARY

The law library at Huntingdon State Correctional Institution is located on the second floor thereby preventing Plaintiff access due to his inability to walk up stairs. See Tabron v. Grace, 6 F.3d 147, 156 (3rd Cir. 1993), citing Rayes v. Johnson, 969 F.2d 700, 703-04 (8th Cir.) (reversing denial of request for counsel where indigent prisoner was severely hampered in pressing his claims by conditions of confinement making him unable to use typewriter, photocopying machine, telephone, or computer), cert. denied,

____ U.S. ____, 113 S.Ct. 658 (1992).

3. DISCOVERY

"[W]here the claims are likely to require extensive discovery and compliance with complex discovery rules, appointment of counsel may be warranted." See Tabron, 6 F.3d at 156, quoting Rayes, 969 F.2d at 703 (reversing district court's denial of request for appointment of counsel in part because conditions of indigent prisoner's confinement severely disadvantaged him in discovery). See also Tucker v. Dickey, 613 F.Supp. 1124, 1133-34 (W.D.Wis. 1985) (need for discovery supported appointment of counsel).

4. CONFLICTING TESTIMONY

The Plaintiff's account of his civil rights violations will no doubt be in conflict with the statements of the defendants emanating into a credibility contest between the defendants and the Plaintiff. "[W]hen a case is likely to turn on credibility determinations, appointment of counsel may be justified." See Tabron, 6 F.3d at 156, quoting Maclin v. Freake, 650 F.2d 885, 888 (7th Cir. 1981) ("[C]ounsel may be warranted where the only evidence presented to the factfinder consists of conflicting testimony.").

5. LEGAL COMPLEXITY

Complexity of the issues and ability of indigent litigants to represent themselves are appropriate factors in reviewing requests for appointment of counsel. Robbins v. Maggio, F.2d 405 (5th Cir.

1985). The court "should be more inclined to appoint counsel if the legal issues are complex." Tabron, 6 F.3d at 156, quoting Hodge v. Police Officers, 802 F.2d 58, 61 (2nd Cir. 1986). The fact that a case will be tried before a jury also supports the appointment of counsel. Abdullah v. Gunter, 949 F.2d 1032, 1036 (8th Cir. 1991), cert. denied, 112 S.Ct. 1995 (1992).

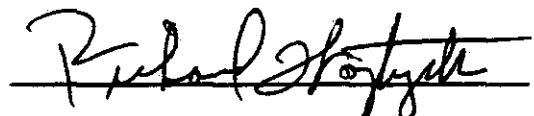
6. MERIT OF THE CASE

"If it appears that an indigent plaintiff with a claim of arguable merit is incapable of presenting his or her case, serious consideration should be given to appointing counsel, see, e.g., Gordon v. Leeke, 574 F.2d 1147, 1153 & n.3 (4th Cir.), cert. denied, 439 U.S. 970, 99 S.Ct. 464 (1978), and if such a plaintiff's claim is truly substantial, counsel should ordinarily be appointed." Tabron, 6 F.3d at 156.

CONCLUSION

For the foregoing reasons, this Court should grant the Plaintiff's motion and appoint counsel to this case.

Respectfully submitted,



Richard Wojtczak AF-5977
1100 Pike Street
Huntingdon, PA 16654-1112

Dated 6-11-01

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD WOJTCZAK,	)	CIVIL ACTION
Plaintiff,)	
v.	)	No. _____
)	
PA. DEPT. OF CORRECTIONS, ET AL.,	)	JURY TRIAL DEMANDED
Defendants.)	

CERTIFICATE OF SERVICE

I, Richard Wojtczak, hereby certify that on June 11, 2001
I served a true and correct copy of the foregoing MOTION FOR AP-
POINTMENT OF COUNSEL with accompanying MEMORANDUM OF LAW by handing
it to the Block BA officer causing it to be deposited in the United
States Mail, firstclass postage prepaid, to the U.S. District Court,
235 N. Washington Ave., P.O. Box 1148, Scranton, PA 18501 to be
served by the U.S. Marshalls (along with the \$1983 civil action)
to the following:

PA Dept. of Corrections
P.O. Box 598
2520 Lisburn Rd.
Camp Hill, PA 17001-0598

Jeffery A. Beard, Ph.D.
Secretary PA Dept. of Corrections
P.O. Box 598
2520 Lisburn Rd.
Camp Hill, PA 17001-0598

Kenneth Kyler
Superintendent (SCIH)
1100 Pike Street
Huntingdon, PA 16654-1112

Patricia Yarger
Health Care Administrator (SCIH)
1100 Pike Street
Huntingdon, PA 16654-1112

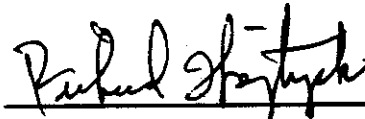
Roger Kimber, M.D.
Medical Director (SCIH)
1100 Pike Street
Huntingdon, PA 16654-1112

Patty Everhart
Nurse Supervisor (SCIH)
1100 Pike Street
Huntingdon, PA 16654-1112

Scott Walters
Unit Manager (SCIH)
1100 Pike Street
Huntingdon, PA 16654-1112

Respectfully submitted,

By:



Richard Wojtczak, pro se
AF-5977
1100 Pike Street
Huntingdon, PA 16654-1112

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD WOJTCZAK, : CIVIL ACTION NO. 1:01-1163
Plaintiff : (RAMBO, J.)
v. : (MANNION, M.J.)
PENNSYLVANIA DEPARTMENT OF :
CORRECTIONS, et al., :
Defendants :

MEMORANDUM AND ORDER

FILED
WILKES BARRE
JUL - 9 2001
MARY E. D'ANDREA, CLERK
Per *[Signature]*
DEPUTY CLERK

Before the court is a motion filed by the plaintiff for the appointment of counsel. (Doc. No. 5).

In Cook v. Bounds, 518 F.2d 779, 780 (4th Cir. 1975), the court held that a federal court is authorized to request, in its discretion, an attorney to represent any person unable to employ counsel. However, in Mallard v. U.S. District Court, 490 U.S. 296 (1989), the court held that 28 U.S.C. § 1915(d) does not authorize the district court to require an unwilling attorney to represent an indigent litigant in a civil case.

Moreover, the plaintiff has no constitutional or statutory right to appointment of counsel in a civil case. While the court does not have the power to appoint counsel under 28 U.S.C. § 1915(d), see Ray v. Robinson, 640 F.2d 474, 477 (3d Cir. 1981), the Third Circuit has stated that appointment of counsel should be made

only. . . upon a showing of special circumstances indicating the likelihood of substantial prejudice to him resulting. . . from (a) probable inability without such assistance to present the facts and legal issues to the court in a complex but arguably meritorious case.

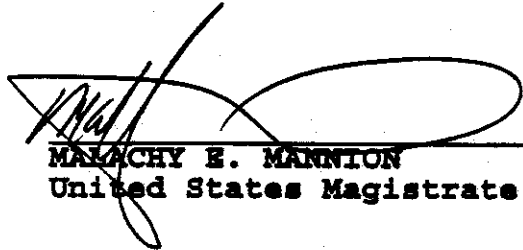
Smith-Bey v. Petsock, 741 F.2d 22, 26 (3d. Cir. 1984).

In Tabron v. Grace, No. 92-7018 (3d Cir. Oct. 5, 1993), the United States Court of Appeals for the Third Circuit did not set aside its holding in Smith-Bey. Rather, the court elaborated by setting forth a number of factors the court should consider when deciding whether to appoint counsel under 28 U.S.C. § 1915(d). The court in Tabron discussed the following factors: (1) the merits of the plaintiff's claim; (2) the plaintiff's ability to present his or her case considering the plaintiff's education, literacy, experience and the restraints placed on the plaintiff by incarceration; (3) the complexity of the legal issues; (4) the degree to which factual investigation is required and the plaintiff's ability to pursue such investigation; and (5) the degree to which the case turns on credibility determinations or expert testimony. Tabron, supra, No. 92-7018, slip. op. at 13-15.

The plaintiff's complaint indicates that he has the ability to "present the facts and legal issues to the court" without the assistance of an attorney. A review of the record of this case suggests that plaintiff can, given the leeway afforded to pro se litigants, adequately present his case and follow the applicable Rules. The plaintiff is literate and is able to communicate his thoughts to the court. His filings this far have been understood, and they indicate that plaintiff is capable of pursuing his complaint without the benefit of appointed counsel. The issues raised by plaintiff do not appear to be complex.

Thus, for the foregoing reasons, the plaintiff's request for court-appointed counsel will be denied.

NOW, THEREFORE, IT IS ORDERED THAT
the plaintiff's motion for appointment
of counsel (Doc. No. 5) is denied.



MALACHY E. MANNION
United States Magistrate Judge

Dated: July 9, 2001

Certificate of Service

I, Richard Wojtylak, hereby certify that I have mailed a true and correct copy of these -- Objections to the Magistrate - Judge Report - Recommendations - Findings, Denying appointment of Legal counsel To:

Clerk of Courts
Middle District of Penna.
U.S. District Court
228 Walnut St.
P.O. Box 983
Harrisburg, Pa. 17108
4 copies

Magistrate - Judge
Malachy F. Mannion
U.S. District Court
Middle District of Penna.
235 N. Washington Ave.
P.O. Box 1148
Scranton, Pa. 18501
1 copy

On this 17th day of July 2001.

Respectfully submitted,

s/ Richard Wojtylak
Richard Wojtylak AF 5977
1100 Pike St.
Huntingdon, Pa. 16654-1112